No. 89-1574 and No. 89-1587

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
GENERAL MOTORS ACCEPTANCE CORPORATION, and
GMAC LEASING CORPORATION,
Petitioners,

v.

DEPARTMENT OF REVENUE,
STATE OF ALABAMA,
Respondent.

REYNOLDS METALS COMPANY,
Petitioner,

v.

JAMES M. SIZEMORE, JR., as Commissioner of
Revenue of the State of Alabama,
Respondent.

On Petitions for a Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully moves the Court

for leave to file the accompanying brief *amicus curiae* in support of the Petitions for a Writ of Certiorari in this case. Tax Executives Institute has requested the written consent of all parties to the filing of the accompanying brief. Petitioners have consented to the filing of the brief, but the consent of Respondents has been denied.*

1. Tax Executives Institute, Inc. is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4 300 members who represent more than 2,000 of the leading corporations in the United States and Canada. The members of the Institute represent a cross-section of the business community in North America, and nearly all the companies represented by the Institute's membership are engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

2. a. The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977). This case involves whether the State of Alabama's franchise tax on foreign, or out-of-state, corporations—which is imposed on a tax base much broader than the base upon which the franchise tax on domestic corporations is imposed—contravenes the Commerce Clause and the Equal Protection Clause of the United States Constitution.

b. Although the trial court and the intermediate appellate court concluded that the Alabama tax violates the

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* The consents of Petitioners have been filed with the Clerk of the Court.

Equal Protection Clause, the Alabama Supreme Court held that the tax passes constitutional muster, under both the Commerce Clause and the Equal Protection Clause, because it does not "invidiously discriminate" against foreign corporations by imposing a grossly disproportionate tax on them for no other reason than to provide a competitive advantage to domestic corporations.* In so ruling, the Alabama Supreme Court essentially equated the standards under which Equal Protection and Commerce Clause challenges are to be judged.

c. Thus, this case raises the question of the propriety of the Alabama Supreme Court's blurring of the distinction between the Constitution's Commerce Clause and Equal Protection Clause, as well as to the application of the appropriate constitutional standards to the State of Alabama's foreign franchise tax.

3. a. Tax Executives Institute's members have a vital interest in the resolution of these issues. More than $200 million is at stake in this case. Furthermore, even those members whose companies are not doing business in Alabama are, almost without exception, engaged in interstate commerce. Consequently, they benefit from, and are entitled to, the protection afforded by the Commerce Clause and Equal Protection Clause of the United States Constitution. The potential diminution of that protection —which is clearly portended by the Alabama Supreme Court's decision—is of material concern to the Institute and all its members.

b. The Court's resolution of this case will affect far more than the State of Alabama's ability to exact a

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* The trial court's Memorandum Opinion is reprinted in Appendix C to the Petition for a Writ of Certiorari filed by General Motors Corporation, General Motors Acceptance Corporation, and GMAC Leasing Corporation (General Motors App. C at 50a-54a); the intermediate appellate court's decision is reprinted in General Motors App. B at 39a-49a; and the Alabama Supreme Court's opinion is reprinted in General Motors App. A at 1a-38a.

"grossly disproportionate" tax from the parties in this case or even from all foreign corporations doing business within the State. The Institute is concerned that the decision of the Alabama Supreme Court—if not reviewed and reversed—could substantially dilute the protection intended by the Commerce Clause and the Equal Protection Clause. Until the mandates of the Constitution are clarified, the decision of the Alabama Supreme Court stands as an open invitation to other States to join Alabama in enacting, or refusing to remedy, franchise and possibly other taxing schemes that discriminate against out-of-state taxpayers. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963) (adoption of "similar unequal tax structures" in other States is a "not unlikely result" of sustaining challenged statute).

c. It is the members of the Institute and their employers who will bear the additional and discriminatory costs that flow from the States' misapprehension of the appropriate standards in evaluating Equal Protection and Commerce Clause claims. Tax Executives Institute is particularly disquieted by the suggestion that the Alabama statute should be sustained because its discriminatory effect could be nullified by reincorporating within the State or by operating through Alabama subsidiaries. This suggestion—which was advanced by an official of the Alabama Department of Revenue whose affidavit the Alabama Supreme Court quoted at length and relied on—could entail substantial administrative and other non-tax related costs, especially if other States adopt comparable taxing schemes. As an organization dedicated to minimizing the costs and burdens of tax administration to the common benefit of government and taxpayers, Tax Executives Institute believes it is imperative for this Court to resolve whether a corporation can be compelled to domesticate its entire business or at least its Alabama activities in order to vindicate its Commerce Clause rights.

d. Because the members of the Institute and the companies by which they are employed would suffer the "unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 537 (1935), that the Commerce Clause was intended to prevent and that could result from the Alabama decision, Tax Executives Institute has a special and direct interest in the outcome of this case.

WHEREFORE, it is respectfully requested that Tax Executives Institute's motion for leave to file the accompanying brief *amicus curiae* in support of the Petitions for a Writ of Certiorari be granted.

Respectfully submitted,

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May 10, 1990

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the Petitions for a Writ of Certiorari. Tax Executives Institute, Inc. is a voluntary, non-profit association of corporate and other busi-

ness executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,300 members who represent more than 2,000 of the leading corporations in the United States and Canada. The members of the Institute represent a cross-section of the business community in North America, and nearly all the companies represented by the Institute's membership are engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

Tax Executives Institute's members have a vital interest in the resolution of this case which potentially involves refunds of more than $200 million. Furthermore, even those members whose companies are not doing business in Alabama are, almost without exception, engaged in interstate commerce. Consequently, they benefit from, and are entitled to, the protection afforded by the Commerce Clause and Equal Protection Clause of the United States Constitution. The potential diminution of that protection—which is clearly portended by the Alabama Supreme Court's decision—is of material concern to the Institute and all its members.

SUMMARY OF ARGUMENT

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977). To effectuate this purpose, a state taxing scheme will be invalidated if it imposes a higher tax burden on foreign, or out-of-state, corporations than on domestic corporations engaged in comparable activity. *Id.* at 329. Moreover, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court held that the presence of either a discriminatory purpose or

a discriminatory effect would justify a finding of proscribed "economic protectionism." *Id.* at 272-73.

In contrast to Alabama's domestic franchise tax (which is based only on the par value of the corporation's outstanding stock), the foreign tax base includes not only that value, but also surplus, retained earnings, long-term and related-party debt, and accelerated depreciation. As a result of the different tax bases, foreign corporations doing business in Alabama have been subject to a much higher level of taxation than were similarly situated domestic corporations. Although the trial court and the intermediate appellate court concluded, based on the record, that the Alabama tax violates the Equal Protection Clause, the Alabama Supreme Court held that the tax passes constitutional muster, under both the Commerce Clause, and the Equal Protection Clause, because it does not "invidiously discriminate" against foreign corporations.

The Alabama Supreme Court, however, erroneously equated the standards under which Equal Protection and Commerce Clause challenges are to be judged. In point of fact, different standards are to be applied: whereas a statute may withstand attack on Equal Protection grounds where a classification for taxing purposes is "rationally related to [a legitimate state] purpose," *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985), the Commerce Clause proscribes *all* taxes that discriminate against interstate commerce, without regard to whether the discrimination is pervasive or intentional. *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981); *see Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72-73 (1963).

The record in this case establishes that the Alabama franchise tax grossly discriminates against foreign corporations and, further, that no legitimate state purpose is served by the discriminatory scheme. Thus, even if the Alabama Supreme Court were correct in stating that a legitimate purpose can validate a discriminatory tax un-

der both the Equal Protection and the Commerce Clause —and it was not—the foreign franchise tax cannot be sustained because there was no such purpose. More fundamentally, the Commerce Clause does not sanction *any* discrimination, regardless of its magnitude or intendment. Stated differently, there is a need to confirm the absolute nature of the anti-discrimination principle that "follows inexorably" from the Commerce Clause. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 329; *Maryland v. Louisiana*, 451 U.S. at 754. Until the applicable standard is clarified, the decision of the Alabama Supreme Court stands as an open invitation to other States to join Alabama in enacting, or refusing to remedy, franchise and possible other taxing schemes that discriminate against out-of-state taxpayers.

In concluding that Alabama's foreign franchise tax is constitutional, the Alabama Supreme Court quoted extensively from an affidavit suggesting that Alabama's facially discriminatory statute should withstand a Commerce Clause challenge because an out-of-state corporation could nullify the unfair discriminatory effect of the statute by reincorporating within the State or by operating through an Alabama subsidiary. A corporation, however, should not be compelled to domesticate its entire business or at least its Alabama activities in order to vindicate its Commerce Clause rights. Indeed, the "fractionalization" of business—or its discontinuance because of the costs involved—is the very thing the Commerce Clause was designed to forestall. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 72-73. To prevent such parochial results, this Court should issue a writ of certiorari and vivify the rights accorded by the Commerce Clause by reversing the decision of the Alabama Supreme Court.

ARGUMENT

I.

This case involves whether the State of Alabama's franchise tax on foreign, or out-of-state, corporations contravenes the Equal Protection Clause and the Commerce Clause of the United States Constitution. U.S. Const. amend. XIV, § 1; U.S. Const. art. I, § 8, cl. 3.

Foreign corporations doing business within the State of Alabama are subject to a franchise tax based on "the actual amount of . . . capital employed" in the State. Ala. Code § 40-14-41(a) (1975); *see* Ala. Const. art. XII, § 232 (1901). The Alabama Code defines "capital" to include not only the par value (or stated value) of the foreign corporation's outstanding capital stock, but also its surplus (including paid-in surplus, capital surplus, and retained earnings), long-term debt, certain related-party debt, and accelerated depreciation. Ala. Code § 40-14-41(b) (1975). Capital employed in Alabama is determined by apportioning total capital to Alabama on the basis of a three-factor formula (property, payroll, and sales).

Domestic corporations are also subject to an annual franchise tax for the privilege of doing business within Alabama, but the base upon which the domestic tax is computed differs materially from the foreign franchise tax base. Specifically, the domestic tax is imposed solely on the amount of the domestic corporation's "capital stock," which has been interpreted to mean the aggregate par value of the domestic corporation's outstanding stock. Ala. Code § 40-14-40 (1975); *see* Ala. Const. art. XII, § 229 (1901); *In re: James C. White, etc., and State Department of Revenue v. Reynolds Metals Company, et al.*, No. 89-386 (Ala. Dec. 21, 1989), *reprinted in* Appendix A to the Petition for a Writ of Certiorari filed by General Motors Corporation General Motors Acceptance Corporation, and GMAC Leasing Corporation (General Motors App. A) at 10a-11a. Because the Alabama Code permits domestic corporations to issue stock

of low or no par value, such corporations may reduce their franchise tax liability to as little as $50 without changing their size, total capitalization, or the extent of their business activity within or without Alabama—any of which would affect a foreign corporation's tax liability. *See* Ala. Code §§ 10-2A-32 (1975) (shares may have any par value or no par value); 10-2A-35 & Commentary (there is "no minimum dollar amount of consideration that must be allotted to stated capital"); 40-14-40 (domestic franchise tax shall be no less than $50).[1]

Thus, whereas the domestic franchise tax is based solely on the par value of the corporation's outstanding stock (which under Alabama law is subject to a domestic taxpayer's control), the foreign tax base includes not only that value, but also surplus, retained earnings, long-term and related-party debt, and accelerated depreciation. What is more, even though the franchise tax on foreign corporations is imposed on a much broader tax base than the domestic franchise tax, the rates of the foreign and domestic taxes were identical through 1983: $3.00 per $1,000 of "capital employed" (for foreign corporations) and $3.00 per $1,000 of "capital stock" (for domestic corporations). For 1984 and subsequent years, the domestic tax rate is $10.00 per $1,000 of capital stock while the foreign tax rate remains at $3.00 per $1,000 of capital employed.

As a result of the different tax bases, foreign corporations doing business in Alabama have been subject to a much higher level of taxation than were similarly situated domestic corporations. In 1983, when foreign corporations in the aggregate employed 55 percent of the total "capital employed" in the State, they incurred a franchise tax burden nine times that incurred by domestic corporations. Record 364. Thus, had domestic corporations been subject to a franchise tax imposed on

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[1] Before the domestic franchise tax was amended in respect of years after 1983, the minimum amount of the tax was $25.

the same tax base as the foreign franchise tax, their aggregate tax liability in 1983 would have risen from $5 million to $38 million. Record 327, 370.[2] The effect of the different taxing schemes varies from corporation to corporation: for example, according to the record, the aggregate tax incurred by petitioner GMAC Leasing Corporation from 1983 through 1986 was 11,000 percent greater than it would have been had it been a domestic corporation conducting the same business within the State of Alabama. Record 50, 51, 52, 53, 66; *see* Affidavit of James R. Mogle, Chief Tax Officer of GMAC Leasing Corporation, *reprinted in* General Motors App. L at 82a.

II.

On July 7, 1989, the trial court entered a Partial Judgment and Memorandum Opinion holding that the Alabama foreign franchise tax is unconstitutional as violative of the Equal Protection Clause.[3] The trial court found that the law "facially discriminates" against foreign corporations and that it "likewise is discriminatory in its application." The trial court made specific reference to the "gross disparity of franchise taxes paid by a foreign corporation when compared to domestic corporations" and to the Alabama Department of Revenue's "fail[ure] to advance any legitimate state purpose for this discrimination." General Motors App. C at 52a. In light of its finding that the franchise tax violates the Equal Protection Clause, the trial court declined to address the Commerce Clause issue. General Motors App. C at 51a.

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[2] Although the 1984 increase in the domestic tax rate (from $3.00 to $10.00 per $1,000 of capital stock) mitigated somewhat the disparity between the levels of foreign and domestic taxation, it by no means equalized the tax burdens. Thus, in 1984, the average differential between the two taxes remained in excess of 300 percent. Record 364.

[3] The trial court's Partial Judgment is reprinted in General Motors App. D at 55a-56a; its Memorandum Opinion is reprinted in General Motors App. C at 50a-54a.

On appeal to the Alabama Court of Civil Appeals, the State's attempt to defend the constitutionality of its foreign franchise tax was rebuffed.[4] The intermediate appellate court, which issued its decision on November 28, 1989, held that "the amount of franchise taxes paid by foreign corporations is enormously disproportionate to that paid by the domestic corporations" and that, upon a review of the record, it agreed with the trial court that "no legitimate state purpose" existed for the "grossly disproportionate" tax. General Motors App. B. at 42a.[5] Like the trial court, the Court of Civil Appeals found it unnecessary to consider the Commerce Clause issue.

Two days after the Court of Civil Appeals issued its opinion, Alabama's Governor convened a special session of the legislature to consider a replacement tax. The Governor's proposal was to enact a single franchise tax that would apply equally to domestic and foreign corporations; under the proposal, the franchise tax base would be "actual capital employed in this state." Supreme Court of Alabama, Advisory Opinion No. 330, *reprinted in* Appendix to Reynolds Metals Company's Petition for a Writ of Certiorari (Reynolds App.) at 86a. Contemporaneously with the referral of the proposed bill to the legislature, the Governor asked the Alabama Supreme Court to render an advisory opinion whether

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[4] The decision of the Court of Civil Appeals is reprinted in General Motors App. B at 39a-49a.

[5] Although the Department of Revenue had argued on appeal that "the discrimination against foreign corporations rationally relates to the purpose of offsetting possible *difficulties of enforcing* the franchise tax against foreign corporations," the appellate court did not find the argument "persuasive." General Motors App. B at 43a (emphasis in original). In disposing of the Department's claim, the court cited testimony by the Chief of the Department's own Franchise Tax Division that foreign corporations were *easier* to regulate and the remedy against them easier and less costly to enforce. General Motors App. B at 43a.

the proposal would be consistent with the mandates of the Alabama Constitution.

The Alabama Supreme Court concluded that it could not respond to the Governor's request until it considered whether the Alabama franchise tax scheme violates the United States Constitution. Reynolds App. at 85a. Consequently, on December 5, 1989, the Alabama Supreme Court issued a writ of certiorari to the Court of Civil Appeals, ordered the parties to file briefs by December 8, and scheduled oral argument for December 11. Ten days after that argument, the Alabama Supreme Court issued a decision reversing the Court of Civil Appeals and holding that the foreign franchise tax violates neither the Equal Protection Clause nor the Commerce Clause. On that same day (December 21), the Alabama Supreme Court also issued Advisory Opinion No. 330 to the Governor, in which it opined that the Governor's proposed replacement tax would contravene the *Alabama* Constitution, which makes no provision for the apportionment or allocation of the domestic franchise tax. Reynolds App. at 88a; *see* Ala. Const. art. XII, § 229 (1901).

Upon appeal, the Alabama Supreme Court stated that "the ultimate question in applying either equal protection or commerce clause analysis . . . is virtually the same": whether the franchise tax on foreign corporations "*invidiously* discriminates" against those corporations. General Motors App. A at 21a (emphasis in original). In determining that the foreign franchise tax did not so discriminate, the Alabama Supreme Court observed that the original purpose of the challenged statute had been to avoid discrimination against foreign corporations. The court also noted that the state legislature in 1983 had considered but declined to enact legislation to cure the discrimination by taxing domestic and foreign corporations in precisely the same manner. General Motors App. A at 34a.

The Alabama Supreme Court also made reference to several "legitimate purposes" for imposing foreign and domestic franchise taxes on different bases that, while not set forth in the record, were "apparent" to the court, including—

> ease of regulation and enforcement, differences in the utilization of state natural resources between foreign and domestic corporations, and differences in the employment of state residents and utilization of state services between foreign and domestic corporations.

General Motors App. A at 35a-36a.

Finally, the court quoted at length the affidavit of Ernest J. Broadhead, Chief of the Franchise Tax Division of the Alabama Department of Revenue. General Motors App. A at 24a-26a. In particular, the court referred to statements in the affidavit that foreign corporations could reduce the amount of their franchise tax liability "merely by forming domestic corporate subsidiaries in this state or by becoming Alabama corporations themselves." General Motors App. A at 26a; *see* General Motors App. A at 29a.

III.

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977). To effectuate this purpose, a state taxing scheme will be invalidated if it imposes a higher tax burden on foreign corporations than on domestic corporations engaged in comparable activity. *Id.* at 329 ("[p]ermitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects" [citations omitted]); *see Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72-74 (1963).

Moreover, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court held that the presence of either a discriminatory purpose or a discriminatory effect would justify a finding of proscribed "economic protectionism." *Id.* at 272-73.

In declining to invalidate the State of Alabama's foreign franchise tax, the Alabama Supreme Court paid scant attention to the principles that govern Commerce Clause determinations. Indeed, the court's opinion reflects a misapprehension of the test to be applied in determining whether a state taxing scheme imposes an unconstitutional burden on interstate commerce.

Stated simply, the Alabama court erroneously equated the standards under which Equal Protection and Commerce Clause challenges are to be judged. General Motors App. A at 21a. In point of fact, two very different and distinct standards are to be applied: whereas a statute may withstand attack on Equal Protection grounds where a classification for taxing purposes is "rationally related to [a legitimate state] purpose," *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985), the Commerce Clause proscribes *all* taxes that discriminate against interstate commerce, without regard to whether the discrimination is pervasive or intentional. *Maryland v. Louisiana*, 451 U.S. at 760 ("[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates"); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 73 ("we see no reason to depart from the strict rule of equality"); *id.* at 72 (although "an accident of statutory drafting," inequality cannot be countenanced); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 273 ("it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers").

The Alabama Supreme Court's blurring of the standards to be used in judging Commerce Clause and Equal

Protection challenges may be attributable in part to the speed with which it apparently felt compelled to act. All told, only 16 days elapsed from the court's issuance of a writ of certiorari to the Court of Civil Appeals—not in response to a petition by any of the parties but rather in conjunction with a request by the Governor for an advisory opinion—to its decision holding the tax constitutional. Moreover, since neither the Court of Civil Appeals nor the trial court had considered the taxpayers' Commerce Clause arguments (in view of their decisions that the franchise tax contravened the Equal Protection Clause), the Alabama Supreme Court did not have the benefit of the lower courts' reasoning on this issue. With the Governor and the legislature waiting, the court mistakenly collapsed the governing Commerce Clause and Equal Protection standards into a single motive-based test of "invidious discrimination." The court's error in assuming that the legislature's motive was germane under the Commerce Clause was compounded by the rough equivalent of alchemy: its attempting to transmute a record devoid of any justification for the discriminatory taxing scheme into a constitutionally acceptable palliative.

The Alabama Supreme Court's apologia notwithstanding, the record in this case irrefutably establishes that the Alabama franchise tax grossly discriminates against foreign corporations and, further, that no legitimate state purpose is served by the discriminatory scheme. Thus, even if the Alabama Supreme Court were correct in stating that a legitimate purpose can validate a discriminatory tax under both the Equal Protection and the Commerce Clauses—and it was not—the foreign franchise tax cannot be sustained because there was no such purpose. More fundamentally, the Commerce Clause does not sanction *any* discrimination, regardless of its magnitude or intendment. Stated differently, there is a need to confirm the absolute nature of the anti-discrimination principle that "follows inexorably" from the Commerce

Clause. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 329; *Maryland v. Louisiana*, 451 U.S. at 754.

Until the applicable standard is clarified, the decision of the Alabama Supreme Court stands as an open invitation to other States to join Alabama in enacting, or refusing to remedy, franchise and possibly other taxing schemes that discriminate against out-of-state taxpayers. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 72 (adoption of "similar unequal tax structures" in other States is a "not unlikely result" of sustaining challenged statute). The ensuing burden on interstate commerce—the States' sloughing their tax burden off on foreign business by enacting protectionist and discriminatory legislation—threatens to obstruct the free trade zone envisaged by the Constitution. This Court should consequently issue a writ of certiorari and affirm the vitality of the Commerce Clause by reversing the decision of the Alabama Supreme Court.

IV.

In concluding that Alabama's foreign franchise tax passes constitutional muster, the Alabama Supreme Court quoted extensively from the affidavit of Ernest J. Broadhead, Chief of the Franchise Tax Division of the Alabama Department of Revenue. General Motors App. A at 24a-26a.[6] Included in the quoted material was the following statement:

> [F]oreign corporations can manipulate the amount of franchise taxes they pay in Alabama merely by forming domestic corporate subsidiaries in this state or by becoming Alabama corporations themselves.

General Motors App. A at 26a.

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[6] *See also* General Motors App. A at 26a-29a (quotations from the State's brief in support of its motion for summary judgment based on the Broadhead affidavit); General Motors App. A at 29a-30a, 35a, 37a (references to the Broadhead affidavit).

The unmistakable implication of this statement is that the facially discriminatory statute should withstand a Commerce Clause challenge because an out-of-state corporation could nullify the unfair discriminatory effect of the Alabama statute by reincorporating within the State or by operating through an Alabama subsidiary. Although such a course of action might enable a foreign taxpayer to reduce its franchise tax liability, a corporation should not be compelled to domesticate its entire business or at least its Alabama activities in order to vindicate its Commerce Clause rights. Indeed, the "fractionalization" of business—or its discontinuance because of the costs involved—is the very thing the Commerce Clause was intended to preclude. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 72-73.

Moreover, even if the costs of establishing separate *Alabama* subsidiaries were deemed to be constitutionally insignificant in relation to the tax savings realized, it cannot be assumed that Alabama is the only State that would exact such a price. Other States may well stand poised to enact similar discriminatory legislation (involving franchise or perhaps other taxes), with the cost and burden of avoiding "grossly disproportionate" taxes being duplicated from one State to another. The aggregate result of availing oneself of this "option" could be daunting. Hence, the number of corporations in a given corporate group could expand as much as 50 fold as companies establish separate subsidiaries in each jurisdiction in order to overcome the discriminatory effect of an Alabama-type franchise tax. Such an organizational structure would be costly to establish and maintain, not only from a tax administration standpoint but for securities, labor, and other purposes as well.[7]

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[7] For certain companies, of course, the option of establishing separate subsidiaries in every State may literally not be available. For example, a transportation company whose assets and employees move across state lines would find it impossible to operate in interstate commerce through a series of domesticated subsidiaries.

As an organization dedicated to minimizing the costs and burdens of tax administration to the common benefit of government and taxpayers, *amicus* Tax Executives Institute is particularly disquieted by the potential long-term effect of any decision that makes the ability to compete on "tax-neutral" grounds dependent on the establishment of separate subsidiaries in every State. By issuing a writ of certiorari and reversing the decision of the Alabama Supreme Court, this Court can affirm the Commerce Clause's purpose to prevent such parochial results and protect against "unreasonable clog[s] upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), that might otherwise occur.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued and the decision of the Alabama Supreme Court should be reversed.

Respectfully submitted,

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